Canyon Coals, Inc. and United Mine Workers of America, AFL–CIO. Case 26–CA–16073

February 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issue addressed here is whether the judge correctly found that the Respondent violated Section 8(a)(5) of the Act by refusing to execute and abide by a collective-bargaining agreement.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Canyon Coals, Inc., Summertown, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On September 19, 1994, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in response to the Respondent's exceptions and the Respondent filed an answering brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Jane Vandeventer, Esq., for the General Counsel.
James D. Cockrum, Esq. (Brown, Todd & Heyburn), of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in Madisonville, Kentucky, on July 26, 1994. On April 29, 1994, the Acting Regional Director for Region 26 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing based on an unfair labor practice charge filed by the United Mine Workers of America, AFL–CIO (the Union) on March 10, 1994, and amended on March 11, 1994, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record and on my observation of the demeanor of the witnesses,[1] I make the following

[1] The parties called four witnesses, none of whom attempted to mold or shape the truth to achieve a particular end. Thus, the facts set forth herein are credited. Any minor discrepancies or contradictions that might appear to exist in the record are inconsequential.

FINDINGS OF FACT

I. JURISDICTION

At times material, Canyon Coals, Inc. (Company) has been a corporation with an office and place of business in Summertown, Kentucky, where it is engaged in the mining and sale of coal. During the calendar year 1993, the Company in conducting its operations, sold and shipped from its Kentucky facility goods valued in excess of $50,000 directly to points located outside the State of Kentucky. Therefore, I conclude that at times material, the Company has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At times material, United Mine Workers of America, AFL–CIO and its subordinate units involved herein have been, and continue to be, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The threshold issue herein is whether the parties reached an agreement and whether the Company has since requested on February 16, 1994, refused to execute and adhere to the agreement. Counsel for the General Counsel (Government) additionally alleges the Company has failed and refused to adhere to the agreement, inter alia, by failing and refusing to process grievances, failing and refusing to pay certain medical benefits, and failing and refusing to pay certain sick pay, floating day pay, vacation day pay, and clothing allowance benefits.

B. *The Facts*

In May or June 1989, plans for establishing the Company commenced and property was purchased from Peabody Coal Company containing approximately 1.8 to 2 million tons of coal which the Company planned to mine over a 3- to 4-year timespan. Company President Samuel S. Francis (President Francis) contacted District 23 of the Union about the Company's mining plans and was referred to Union Executive Assistant Bradley J. Burton (Executive Assistant Burton) who at that time was the Union's midwestern regional director responsible for, among other districts, District 23. President Francis first met with Executive Assistant Burton in January 1990 and the two discussed Francis' ''2-page laundry list'' of ''things'' it would take from the Union for the Company to successfully mine its property. Specifically, President Francis sought relief from the Union related to any pension liabilities the Company might incur. President Francis told Executive Assistant Burton there was no way ''on earth that [the Company] could assume the pension liabilities associated with [the Union's] pension plan, because of their huge deficits.'' As a result of the Francis/Burton discussions, President Francis on January 18, 1990, signed the National Bituminous Coal Wage Agreement of 1988 (1988 NBCWA).[2]

[2] This agreement was effective by its terms until February 1, 1993.

President Francis told the Union at the time he signed the 1988 NBCWA that he would need something in writing regarding relief for the Company not only from the Union's pension plan liabilities but also payments associated with the Union's 1950 Benefit Plan and Trust.

The Company had not hired any employees at the time President Francis signed the 1988 NBCWA nor had any of the assurances that Francis and Burton negotiated been reduced to writing. President Francis explained he went ahead and signed the 1988 NBCWA at the time he did because he ''felt like [his] discussions with [Executive Assistant Burton] . . . would get the modifications from the Union that the Company wanted.''

According to President Francis, Union District 23 requested he hire employees for his Company from the Peabody Coal Sinclair Panel (Sinclair Panel) because those on that panel had mined coal in the general area where the Company's property was located. President Francis agreed in March 1990 that the Company would hire from the Sinclair Panel in exchange for being granted relief from the Union's 1950 Pension Benefit Plan and Trust.[3] The Company hired only union members and dues were deducted from their wages and transmitted to the Union by the Company. The relief the Company sought was reduced to writing in a Memorandum of Understanding (MOU) between the Company and Union which reads as follows:

MEMORANDUM OF UNDERSTANDING
BETWEEN
CANYON COALS, INC.
AND
UNITED MINE WORKERS OF AMERICA

This Memorandum of Understanding, attached to, and part of, the 1988 National Bituminous Coal Wage Agreement (NBCWA), between Canyon Coals, Inc. and the UNITED MINE WORKERS OF AMERICA, modifies the following provisions of the 1988 NBCWA:

1. Canyon Coals, Inc. will be granted a waiver from contributions to the UMWA 1950 Benefit Plan and Trust that are set forth in Article XX, Section (d) (l) (ii).

2. Article XX(j) withdrawal liability from the 1950 Benefit Plan and Trust shall have no application whatsoever to Canyon Coals, Inc.

3. The above modifications in paragraphs (1) and (2) shall only exist for the duration of the 1988 NBCWA.

This Memorandum is the complete understanding and agreement of the parties signatory hereto. Every other provision of the 1988 NBCWA, other than those modifications set forth above, remain in effect.

/s/ Bradley J. Burton
UNITED MINE WORKERS OF AMERICA
/s/ Jesse Guber, Jr.
Employer, Canyon Coals, Inc., By its Pres.

Dated: Jan. 18, 1990[4]

President Francis testified that about every 6 months, he would read something in the newspapers about health and pension benefit liabilities that would concern him greatly, thus prompting a visit with Executive Assistant Burton.

Such a visit took place in January 1992 with President Francis trying to limit any potential liability the Company's shareholders might have. President Francis was concerned that since health care had become a national issue that may be the modifications to the 1950 Benefit Plan and Trust ''didn't quite say all'' needed to ''make [him] feel comfortable'' so he asked Executive Assistant Burton about adding a paragraph regarding ''individual liability'' and clarifying in writing that if the Company went out of business the employees' health care benefits would be paid by the ''Orphans Fund''[5] rather than by the Company. Executive Assistant Burton testified he, as always, told President Francis he could not control the ''funds'' but the purpose of the 1974 Benefit Plan was to provide such coverage but that the Company had to be ''out of the coal mining business completely'' for the 1974 Benefit Plan to apply. Executive Assistant Burton explained that he and President Francis always operated in a ''very frank and open manner'' and that Francis was seeking clarifications about the Company's liabilities after it went out of business. It was against this backdrop that he and Francis executed the following MOU on January 7, 1992:

MEMORANDUM OF UNDERSTANDING
BETWEEN
CANYON COALS, INC.
AND
UNITED MINE WORKERS OF AMERICA

This Memorandum of Understanding, attached to, and part of, the 1988 National Bituminous Coal Wage Agreement (NBCWA), between Canyon Coals, Inc. and the UNITED MINE WORKERS OF AMERICA, clarifies the following provisions of the 1988 NBCWA:

It has been acknowledged and agreed that when Canyon Coals, Inc., ceases coal production and ''goes out of business,'' then Canyon Coals, Inc., shall not be responsible for any type of health care for former employees. The former employees will become ''orphans'' under the 1974 Pension and Health Benefit Plans.

In addition, it is agreed that the officers and shareholder(s) of Canyon Coals, Inc., shall have no personal liability of any type of health care coverage.

/s/ Bradley J. Burton
UNITED MINE WORKERS OF AMERICA

[3] According to Executive Assistant Burton, in 1990, the pension portion of the 1950 Pension Benefit Plan and Trust was fully funded but the medical and health care benefits was ''in serious financial trouble.''

[4] According to Executive Assistant Burton, the MOU was backdated to the same date the Company executed the 1988 NBCWA. Burton testified he also explained to President Francis that he did not actually control the various ''funds'' and as such there was always the possibility that the ''funds'' administrators would sue the Company.

[5] The so-called ''Orphans Fund'' is a benefit plan established in 1974 whereby employees/pensioners whose companies no longer are in business are provided health care benefits.

/s/ Samuel S. Francis
Employer, Canyon Coals, Inc., By its President
Dated: Jan. 7, 1992

President Francis spoke with Executive Assistant Burton in July regarding what would happen if the Union called a general strike at the expiration of the 1988 NBCWA. President Francis and Executive Assistant Burton discussed the fact a strike against the Company with its debt burden could well force it out of business. President Francis again expressed concern about the Company's, as well as its directors and officers liabilities, if it went out of business. President Francis asked for assurances that their prior understandings would be carried forward into any future agreements. Francis/Burton discussed an interim agreement that would govern what would happen if a general strike was called and President Francis wrote Executive Assistant Burton a letter which reads as follows:

July 24, 1992

Mr. Brad Burton
Region III Director
United Mine Workers of America
916 B Millis Avenue
Boonville, IN 47601

Dear Brad:

On January 18, 1990, Canyon Coals, Inc., and the United Mine Workers of America entered into a Memorandum of Understanding (copy attached). This letter shall confirm that the modifications (1. - 3.) of the Memorandum of Understanding shall apply to any subsequent NBCWA contract entered into by Canyon Coals, Inc.

Thanks for your continued assistance.

Respectfully,
/s/ Sam Francis
Samuel S. Francis

Executive Assistant Burton signed President Francis' July 24, 1992 letter as follows on September 8, 1992:

AGREED:

Bradley J. Burton

UNITED MINE WORKERS OF AMERICA
Date: Sept. 8, 1992

Burton could not recall if Francis demanded he sign the July 24, 1992 letter before he (Francis) would sign the parties' September 8, 1992 Interim Agreement, but acknowledged that certainly made sense.

Executive Assistant Burton and President Francis signed an Interim Agreement on September 8, 1992, that reads as follows:

1992 INTERIM AGREEMENT

This Agreement, made and entered into this *8th* day of *September*, 1992, between Canyon Coals, Inc. (hereinafter the ''Employer''), as a party of the first part, and the International Union, United Mine Workers of America (hereinafter the ''Union''), party of the second part, is intended by both parties to provide for a peaceful and harmonious relationship between labor and management.

1. The party of the first part continues to recognize the Union as the collective bargaining representative of its employees at its mines and facilities covered by the National Bituminous Coal Wage Agreement of 1988 (hereinafter ''1988 National Agreement'');

2. The employer and the Union agree to be bound by and comply fully with the terms and conditions of the agreement successor to the 1988 National Agreement after ratification by the UMWA membership (hereinafter ''the Successor National Agreement'');

3. Such Successor National Agreement will be promptly executed between the parties hereto following an affirmative ratification vote by the UMWA membership. Its terms and conditions will apply to all employees, mines and facilities which are covered by the 1988 National Agreement;

4. In the event there is a period of time between February 1, 1993, and the effective date of the Successor National Agreement, the parties agree to the following:

(a) All terms and conditions of the 1988 National Agreement shall continue to apply to the UMWA bargaining unit during said period and the parties agree to extend and update the 1988 National Agreement in a manner that permits the Union and employees to continue to enjoy all rights and to accumulate all benefits thereunder during the extension period; and

(b) Within thirty (30) days after the Successor National Agreement is executed by the parties (hereinafter the ''New Contract''), the Employer shall issue retroactive payments for any time during said period when the bargaining unit did not strike it. The retroactive payments shall be calculated according to the additional wages, royalty payments, and other benefits, if any, to which the bargaining unit and its members are entitled on the effective date of the New Contract. It is agreed that this retroactively clause shall operate to apply the New Contract retroactive to February 1, 1993, as if the New Contract had been signed and became fully effective on that date, for the sole purpose of calculating the amount and type of retroactive payments owed on behalf of the bargaining unit or to its members for the time during said period when the bargaining unit did not strike the Employer;

(c) In the event the Union authorizes a strike against the BCOA or any of its members upon the termination of the 1988 National Agreement, the Union will *not* call such strike against the Employer. This pledge is made in return for this Employer's promise to make the retroactive payments described in paragraph 4(b) above and its agreement *not* to lock-out any classified employees.

5. This Agreement will expire as of 11:59 p.m. on January 31, 1994, if no Successor National Agreement has been negotiated between the United Mine Workers

of America and the Bituminous Coal Operators Association.

/s/ Bradley J. Burton
International Union, United Mine Workers of America
/s/ Samuel S. Francis
Authorized Representative for the Employer

The U.S. Congress passed the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act of 1992) which President Bush signed into law on October 24, 1992.

President Francis testified he talked with Executive Assistant Burton about 2 months (November 1992) after they signed the Interim Agreement concerning health care and pension liabilities of the Company and its officers that might be impacted by the Coal Act of 1992. President Francis testified he told Executive Assistant Burton:

> [B]rad, I'll try not to bother you too many more times, but I'd like to send you a letter that hopefully once and for all, will put aside my fears that as we go forward, we will have this included in a new contract.

President Francis testified Executive Assistant Burton told him to outline his concerns in a letter and if he could agree with the letter, he (Burton) would sign and return the same to Francis. Francis prepared such a letter which reads as follows:

December 1, 1992

Mr. Brad Burton
Region III Director
United Mine Workers of America
916 B Millis Avenue
Boonville, IN 47601

Dear Brad:

As you know, the agreement between the United Mine Workers of America (UMWA) and Canyon provided that (1) Canyon would be excluded from the 1950 Benefit and Pension Plans, and (2) Canyon would have no health benefit or pension liability when and if Canyon ever ceased operation (Agreement dated January 7, 1992). In consideration of Canyon agreeing to execute the ''Me Too'' Agreement dated September 8, 1992, it was agreed that the previous exclusions and agreements would carry forward into the new agreement.

Since that date, it is my understanding that the 1950 plans are being combined with the 1974 plans and there will be a new combined plan and/or a new plan replacing the old plans. This would seem to make the 1950 Plan exclusion not applicable. However, if at all possible, Canyon will need some type of consideration to offset the loss of this exclusion.

Regardless of what is finally agreed upon concerning the 1950 Plan exclusion, Canyon still needs to be excluded from any health benefit and pension cost once Canyon ceases mining coal. This was the basis and understanding when Canyon first started business. Please acknowledge this continued agreement by signing below.

Canyon is hiring and additional six (6) UMWA miners and is looking forward to being in business for a long time. Hopefully, this agreement will never be applicable.

Respectfully,
/s/ Sam Francis
Samuel S. Francis

Executive Assistant Burton added the following to President Francis' December 1, 1992 letter:

> It has been agreed and it will continue to be agreed in future UMWA agreements, that Canyon Coals, Inc., shall not be liable for any type of health care benefit or pension liability once Canyon Coals, Inc., quits mining and ceases operations. It has also been acknowledged and agreed that the officers and shareholders of Canyon Coals, Inc., shall have no liability for health care benefit or pension liability.
>
> United Mine Workers of America
> By: /s/ Bradley J Burton[6] 12–3–92
> Brad Burton
> Title: Regional Director

President Francis testified he had two other discussions with Executive Assistant Burton in November 1992 regarding the fact the Coal Act of 1992 had changed the parties' modifications to the 1988 NBCWA. President Francis testified he also during that same time had a couple of discussions with Union District 23 Secretary/Treasurer Dukes about the Coal Act of 1992 and its modifications to their agreement. Francis asked Dukes ''could we modify the existing exclusion, to at least still give us our personal understanding that we . . . the shareholders, directors,—would not be liable [for modifications] not covered by the Coal Act.'' According to President Francis, Dukes said ''no'' that when a 1993 NBCWA was negotiated, Francis would have to sign it without modifications. President Francis told Dukes:

> I said, I just said, Benny, there's just no way. When we got into this transaction with the agreement that we would not have these liabilities at the end, there's no way that I can sign a ''93 agreement, and if that's what you're asking me to do, we're certainly at an impasse.'' I said, ''I don't know how to respond, other than we're at an impasse,'' and that's where I left it.

Subsequent to passage of the Coal Act of 1992, the Company paid, during 1993, assessed premiums ($7,066.68) to the Union's Combined Benefit Fund and Plan[7] created pursuant to Section 9702(a)(2) and 9712 of the Coal Act of 1992.

On November 1, 1993, President Francis sent each of the Company's unionized employees a one-page memorandum

[6] Executive Assistant Burton testified it was his intention to once again assure President Francis that these modifications would be carried forward in any future agreements between the Union and the Company. Burton knew the Coal Act of 1992 had been signed into law at the time he signed Francis' letter.

[7] The 1950 Benefit Plan and Trust and the 1974 Benefit Plan were merged by the Combined Benefit Fund called for in the Coal Act of 1992. The Coal Act of 1992 also called for the creation of a second benefit plan titled 1992 Union Benefit Plan.

captioned ''UMWA attempting to change Canyon's long-term liability.'' Pertinent portions of Francis' memorandum follows:

> In 1990, Canyon executed various agreement[s] with the UMWA which *rightfully* exempted Canyon from the 1950 Pension and Benefit Plans as well as any long-term health benefits and withdrawal liability. Canyon would not have executed the UMWA-BCOA agreement without the exclusions because it is obvious Canyon could never afford such costs. This exclusion was reconfirmed and further detailed in 1992.
>
> In September 1992, Canyon executed the ''me too'' agreement with the express consideration that the exclusions from the long-term health benefits would extend to any new agreements. However, in 1993, the *National Office* of the UMWA demanded, prepared, sponsored and supported a legislative statute which was passed and which attempts to void these exclusions granted to Canyon. Voiding the exclusion would cost Canyon in excess of $4,000,000.
>
> Canyon and I have supported the UMWA and have honored the UMWA agreements. Canyon and I have treated each of you fairly and I appreciate that each of you have treated Canyon and me fairly. But, this new statute does not honor Canyon's agreement and could ultimately force Canyon into bankruptcy.
>
> . . . .
>
> In closing, I would like to reiterate that it is the UMWA and the U.S. Congress that is attempting to unilaterally change Canyon's exclusions and agreements. Canyon will not execute any new UMWA agreement unless Canyon and I are guaranteed that the UMWA will honor its previous written and executed agreements. I have included copies of the relevant material.

The Union and the Bituminous Coal Operators Association successfully negotiated a successor agreement (1993 NBCWA) which was ratified and became effective on December 16, 1993.

President Francis testified he received a telephone call either from Secretary/Treasurer Dukes or Union District 23 President Richard Litchfield in February 1994. Francis thereafter returned the call speaking with Litchfield. Litchfield explained that after negotiations for the 1993 NBCWA were completed and the 1992 Interim Agreement set to expire on February 1, 1994, the general counsel for the Union prepared signature sheets for the Independents, such as the Company herein, to sign. All Independents in Union District 23, except the Company, signed such signature sheets. Litchfield testified[8] that when President Francis telephoned:

> I told Mr. Francis that we had copies of the signature sheets for the 1993 BCOA agreement for him to sign, and he told me to tell the International that he respectfully declined to sign those sheets.
>
> . . . .
>
> And then we got into the discussion as to why he would not sign the sheets, the contract signature sheets, and he informed me it's because . . . the union or the International—would not follow through on the agreements they had made with him.
>
> I explained or I made the comment to Mr. Francis, that because of the Coal Act . . . .
>
> . . . .
>
> [H]e has to pay into the combined fund and the 1992 benefit fund.

Local District 23 President Litchfield reported to the International Union on February 16, 1994, that President Francis was refusing to execute the 1993 NBCWA. Thereafter, the Union filed the unfair labor practice charge that gives rise to the instant case.

It is undisputed the Company has not executed, nor abided by, the terms of the 1993 NBCWA. More specifically, the uncontradicted evidence (or stipulated record) reveals the Company has, since December 1993, refused to process grievances, pay certain medical benefits (such as the 1994 $1000 health deductible bonus), pay sick day, floating day, vacation day, or clothing allowance benefits to its unionized employees.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

Section 8(d) of the Act defines the duty to bargain collectively as the duty to meet and confer ''in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party.'' An employer violates Section 8(a)(5) and (1) of the Act by refusing to execute a written contract incorporating the terms of a collective-bargaining agreement reached with a union representing its employees. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941). The Court noted in *Heinz* that an employer's refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process, and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

As alluded to earlier, the threshold question is whether there was a meeting of the minds and whether the parties reached an agreement. In determining whether an agreement has been reached, the particular circumstances surrounding the parties' negotiations and dealings must be considered including the parties' collective-bargaining history and setting.

From the inception of the Company, President Francis' aim has been to have the Company mine coal with union labor but with the Company being exempted from certain union health and pension benefit obligations, particularly when the Company ceased operating after 3 to 4 years. When President Francis initially approached the Union about the Company forming and using union labor, he had a ''laundry list'' of concessions he wanted from the Union. It is apparent the Union through Executive Assistant Burton negotiated in good faith with President Francis and that each had respect for the other is in part borne out by President Francis' signing of the 1988 NBCWA before a side agreement he sought was executed because he trusted Executive Assistant Burton. The parties executed a side agreement in January 1990 giving the Company certain relief from requirements of the Union's 1950 Benefit Plan and Trust. As of 1990, the pension portion of the 1950 Benefit Plan and Trust was fully funded but the medical and health care bene-

[8] President Francis agrees Litchfield testified accurately.

fits portion was ''in serious financial trouble.'' It was against this backdrop that President Francis sought, and was granted relief. Every few months President Francis sought further assurances from Executive Assistant Burton regarding any potential liability the Company might have with respect to pension and health care obligations. President Francis requested further assurances regarding the Company's and its officers liabilities related to pension and health fund obligations that might arise when the Company went out of business. Francis and Burton executed such a MOU in January 1992 in which the Company was assured that when it went out of business, it would ''not be responsible for any type of health care for former employees'' that the former employees would be considered ''orphans'' under the Union's 1974 Pension and Health Benefit Plans. The Union further assured the Company that its officers and shareholders would have ''no personal liability of any type'' for ''health care coverage'' after the Company went out of business. In July 1992, President Francis sought, and on September 8, 1992, Executive Assistant Burton ''agreed,'' that their side agreements of understanding modifying the 1988 NBCWA would be carried forward to any subsequent NBCWA entered into or adopted by the Company. It was at this same time (September 8, 1992) that the Company entered into an interim agreement with the Union in which it agreed to be ''bound by and comply fully with the terms and conditions of the agreement successor to the 1988 National Agreement after ratification by the UMWA membership.'' Thereafter, the Coal Act of 1992, came into being. That act mandated changes that impacted the modifications the parties had agreed on. On December 1, 1992, President Francis wrote Executive Assistant Burton about his continuing concerns related to health benefits and pension liabilities the Company might have as a result of the 1950 and 1974 plans being replaced by ''a new and combined plan.'' In his December 1, 1992 letter President Francis sought assurances from the Union that regardless of what the outcome might be with respect to the plans, the Company still needed to be excluded from any health benefit and pension plan costs once the Company ceased mining coal. President Francis also wanted further assurances that all previous exclusions and agreements related thereto would be carried forward into the parties' new agreement. On December 3, 1992, Executive Assistant Burton provided President Francis such assurances when in a written response he declared: ''It has been agreed and it will continue to be agreed in future UMWA agreements, that Canyon Coals, Inc., shall not be liable for any type of health care benefits or pension liability once Canyon Coals, Inc., quits mining and ceases operations. It has been acknowledged and agreed that the officers and shareholders of Canyon Coals, Inc. shall have no liability for health care benefits or pension liability.'' The above-outlined assurances that President Francis sought and that Executive Assistant Burton granted came after enactment of the Coal Act of 1992. The parties are presumed to have acted with knowledge of the ramifications of all applicable laws governing their relationship including the Coal Act of 1992. Thus the parties agreed in writing as of December 3, 1992, that all prior exclusions and modifications negotiated between the parties were, and would continue to be, binding and in effect after ratification of the 1993 NBCWA. The long bargaining history, as outlined in this portion of the decision, establishes the Company and Union envisioned the Company would be exempted from certain health care and pension benefit requirements outlined in the 1988 and 1993 NBCWA. The only thing left to complete the parties' successor agreement is for the Company to execute the 1993 NBCWA.

In light of all the above, I conclude and find there was a meeting of the minds and that the parties arrived at a successor agreement. The successor agreement is the 1993 NBCWA with all exclusions and modifications agreed to by the parties from the inception of their relationship. I find it unnecessary to address which, if any, of the exclusions or modifications previously agreed upon have been specifically preempted by the Coal Act of 1992. The severability clause ''Article XXVIII, Section (a),'' page 272 of the 1993 NBCWA will preserve any unimpacted portions of the parties' agreement.

The Company may not be excused from executing the 1993 NBCWA on the basis that the Union, District 23 Secretary/Treasurer Dukes in particularly, refused to execute a side agreement excluding the Company and its officials from any pension or health care liabilities not preempted by the Coal Act of 1992. All prior exclusions and modifications remain in full force and effect per Executive Assistant Burton's agreement dated December 3, 1992, and are carried forward regardless of whether the Union signs any further understandings with the Company. Such further signing on the part of the Union would be a meaningless redundant act inasmuch as the Union is already obligated in writing to honor all previously agreed-on exceptions, exclusions, and modifications. This is particularly so in light of the fact the Union's most recent reaffirmations came after enactment of the Coal Act of 1992.

CONCLUSIONS OF LAW

1. Canyon Coals, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees engaged in the mining of coal and reclamation of mines, as described in article IA of the National Bituminous Coal Wage Agreement of 1993 (1993 BCOA Agreement), excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At times material, the Union has been, and is, the exclusive collective-bargaining representative of the employees in the unit described above.

5. By failing and refusing to execute the 1993 NBCWA, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend the Company be ordered to execute the 1993 NBCWA as requested by the Union on February 16, 1994. I further recommend the Company be ordered to comply with the terms of the 1993 NBCWA retroactive to its effective date and make whole the bargaining unit employees and the Union for losses, if any, they may have suffered by the Company's refusal to sign the contract in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This remedy is tempered by the fact the parties agreed in writing on December 3, 1992, that all prior exclusions and modifications agreed to by the parties from the inception of their bargaining relationship shall continue to be in full force and effect.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Canyon Coals, Inc., Summertown, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the 1993 National Bituminous Coal Wage Agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith, execute the 1993 NBCWA as requested by the Union on February 16, 1994.

(b) Give retroactive effect to the terms and conditions of employment of the contract and make whole its employees and the Union for any losses they may have suffered by reason of the Company's failure to execute the contract as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Summertown, Kentucky, facility copies of the attached notice marked ''Appendix.''[10] Copies of the notice on forms provided by the Regional Director for Region 26, after being signed by the Company's authorized representative shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Company has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid and protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to execute the 1993 National Bituminous Coal Wage Agreement agreed on between us and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request by the Union, forthwith execute the 1993 National Bituminous Coal Wage Agreement to which the Company and Union agreed on December 16, 1993.

WE WILL give retroactive effect to the terms and conditions of employment of the contract and make whole our employees and the Union for any losses they may have suffered by reason of our failure to execute the agreement with interest.

CANYON COALS, INC.